

SERVED: December 11, 2000

NTSB Order No. EA-4869

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of December, 2000

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| _____ |) | |
| JANE F. GARVEY, |) | |
| Administrator, |) | |
| Federal Aviation Administration, |) | |
| |) | |
| Complainant, |) | |
| |) | Docket SE-15917 |
| v. |) | |
| |) | |
| WILLIAM E. SMITH, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding on April 28, 2000, at the conclusion of an evidentiary hearing.¹ By that decision, the law judge affirmed an emergency order of the Administrator revoking respondent's airline transport pilot certificate (No. 001774856) for his alleged violations of sections 39.3, 91.7(a), 91.13(a), 91.213(a)(1),

¹An excerpt from the hearing transcript containing the initial decision is attached.

91.405(b), 91.407(a)(1) and (2), 91.409(b), and 119.5(1) of the Federal Aviation Regulations, "FAR," 14 C.F.R. Parts 39, 91, and 119.² For the reasons discussed below, we will affirm the law judge's decision.³

The Administrator's April 14, 2000 Emergency Order of Revocation, a copy of which is attached, sets forth numerous allegations of conduct that contravened regulatory prohibitions. In summary, it asserts that respondent, as pilot-in-command and while serving as president, director of operations, and chief pilot for Airsmith, a common carrier under FAR Part 135 with two aircraft that employed only respondent, had operated (1) three passenger flights in aircraft that were unairworthy for lack of heater or magneto testing in accordance with airworthiness directives; (2) one commercial flight in an aircraft (N29DP) that had been taken off Airsmith's operations specifications because of an unairworthy engine; and (3) four flights (one for revenue) in an aircraft (N5844Y) that was out of inspection and that respondent knew was unairworthy because of nine uncorrected maintenance discrepancies that had been discovered during an annual inspection that had not been completed when respondent

²These regulations are described in the attached copy of the Administrator's order, which served as the complaint.

³The Administrator has filed a reply opposing the appeal, as well as two motions to strike the numerous documents respondent has filed in this matter in response to the reply brief. No leave for filing these documents has been sought, no attempt has been made to establish good cause for their submission, and they do not meet the additional case citation exception to the general prohibition in our rules against multiple briefs. The motions to strike are granted.

flew the aircraft, which had not been returned to service.⁴ The law judge found that the Administrator's evidence, testimonial and documentary, established these allegations and justified the finding of the violations of the regulations cited in her order. Moreover, he concluded that respondent had deliberately flown both of Airsmith's aircraft with knowledge that they were not airworthy (Complaint paragraphs 23 and 25), a circumstance the law judge believed had a direct bearing on respondent's qualification to hold a pilot certificate.⁵ We find no error in the law judge's conclusions.

We agree with the Administrator that respondent's appeal fails to identify any issue warranting our consideration.⁶ See Section 821.49 of the Board's Rules of Practice, 49 C.F.R. Part

⁴The record also contains testimony, credited by the law judge, that respondent, himself a certificated airframe and powerplant rated mechanic, was Airsmith's maintenance coordinator, with "responsibilities for coordinating and tending to the maintenance of [Airsmith] aircraft" (Transcript at 66).

⁵In view of this finding, it makes no difference, for purposes of the proper sanction, whether the evidence was sufficient to establish that one of the four flights in N5844Y on April 6, 2000 was commercial in nature. Respondent's willful operation of these unairworthy aircraft, whether or not for compensation or hire, reveals a level of contempt for regulatory requirements that is incompatible with air safety and, consequently, his continued certification as a pilot. We note, nevertheless, that respondent did not refute the Administrator's showing that the aircraft, used in revenue service, needed a 100-hour inspection whether the flights were under Part 91 or 135.

⁶In this connection, the Administrator is clearly correct in asserting that the Board will not entertain stale complaint claims made for the first time on appeal, see Administrator v. Pearsall, NTSB Order No. EA-3576, n.3 (1992), and that respondent's post-hearing misgivings about not enlisting professional counsel to represent him are not a basis for appeal, see Administrator v. Jorden, NTSB Order No. EA-4037, n.5 (1993).

821, and Administrator v. Maciag, 7 NTSB 1136, 1138 (1991).⁷ For example, respondent's principal contention on appeal, namely, his insistence that he can not be held accountable as the operator for maintenance discrepancies on flights on which he served as pilot-in-command for this essentially one-man operation, is insubstantial and meritless. Eight of the nine regulations under which he is charged (i.e., FAR sections 39.3, 91.7(a), 91.13(a), 91.213(a)(1), 91.407(a)(1) and (2), 91.409(b), and 119.5(1)) are directed at any "person" involved with the operation of an aircraft, not an operator. Since the definition of "person" includes "an individual," those regulations clearly apply to him as the pilot of the subject flights. See 14 C.F.R. Part 1. As to the ninth regulation (FAR section 91.405(b)), which speaks to the "owner or operator" of an aircraft, there can be no question, given respondent's involvement in all facets of Airsmith's activities, that he is also chargeable as an operator.⁸

⁷Section 821.49(a) states as follows:

§ 821.49 Issues on appeal.

(a) On appeal, the Board will consider only the following issues:

(1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence?

(2) Are conclusions made in accordance with law, precedent, and policy?

(3) Are the questions on appeal substantial?

(4) Have any prejudicial errors occurred?

⁸14 C.F.R. section 1.1 does not define "operator." However, it defines "operate" to mean to "use, cause to use or authorize to use aircraft, for the purpose of...air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).

Moreover, respondent's disagreements with the law judge's findings, including his credibility assessments in favor of the Administrator's inspector witnesses and a mechanic who does some maintenance for Airsmith, on disputed factual matters are not predicated on any effort to show that the law judge misweighed any of the evidence, or drew any inference or conclusion that the record before him could not reasonably support. Rather, they are simply reflective of his view that he was not shown to have done anything demonstratively unsafe and has been subjected to overly strict enforcement policies by an inspector who monitored Airsmith's operations more closely than respondent believes was appropriate or necessary.⁹ Such issues fall generally outside of the scope of a proceeding designed to adjudicate allegations that a certificate holder has breached a legal duty the FAR imposed.

Finally, we have carefully reviewed the transcript of the hearing in this case and are satisfied that respondent's suggestions that the law judge adversely affected his ability to present evidence or cross examine the Administrator's witnesses are either not supported by the record or frivolous.

⁹It is of no decisional importance either that respondent did not agree with the safety judgments incorporated in the airworthiness directives that required periodic testing of a heater in one aircraft and a magneto in another or that he developed a strong dislike for one of the inspectors assigned to Airsmith's operations. An enforcement proceeding is not a forum for second-guessing the Administrator's regulatory requirements or staffing choices.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and
2. The emergency order of revocation and the initial decision are affirmed.

HALL, Acting Chairman, HAMMERSCHMIDT, GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.